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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 27.

CATHARINE HENDERSON, PLAINTIFF IN ERROR,

vs.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISINA.

FILED JULY 14, 1884.

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1 UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CATHERINE HENDERSON
v.
THE LOUISVILLE AND NASHVILLE R. R. Co. } No. 10460.

Petition. Filed Jan'y 16, 1884.

STATE OF LOUISIANA, }
Eastern District of Louisiana, } *ss:*

In the Circuit Court of the United States for the Eastern District of Louisiana. In the November Term, A. D. 1883.

To the honorable the judges of the circuit court of the United States for the eastern district of Louisiana:

Catherine Henderson, wife of John Henderson, of the city of New Orleans, in the said district, plaintiff, exhibits this her petition against the Louisville and Nashville Railroad Company, defendants; and thereupon the plaintiff articulately propounds — follows, to wit:

2 First. That the plaintiff is duly authorised and assisted by her said husband to institute and prosecute this suit.

Second. That the plaintiff is a citizen of the State of Louisiana aforesaid, and that the said Louisville and Nashville Railroad Company is a corporation created and existing under and by virtue of the statutes of the State of Kentucky, and that the said defendants are carrying on business in the said State of Louisiana, having one of their principal places of business in the said city of New Orleans, at the southwest corner of St. Charles street and Common street, in said city of New Orleans, and that one J. T. Harahan is the general agent of the said defendants at New Orleans aforesaid, and that he is the person to receive and accept service of process for the said defendants in the said district.

Third. That heretofore, to wit, on the twenty-fifth day of October, A. D. 1883, the defendants, being common carriers of goods and persons for hire from Pass Christian, in the State of Mississippi, to New Orleans, in said district, prepared and made ready a certain train of cars or coaches, with a tender and locomotive engine thereto attached, to carry and convey all persons who might choose to use and occupy any of said cars or coaches as passengers for hire from Pass Christian aforesaid to New Orleans aforesaid; and having prepared and made ready said train of cars as aforesaid for the purposes aforesaid the defendants invited all persons whomsoever to enter into said cars or coaches as passengers thereof for the purposes aforesaid.

3

Fourth. That all persons accepting said invitation of the defendants had the lawful right to take into said cars or coaches things of whatsoever value and the same to keep in their immediate posses-

sion, custody, and control in said cars or coaches, of all which matters aforesaid the defendants then and there on the day and year aforesaid had notice.

4 Fifth. That the defendants then and there constituted and appointed one James Dowling their agent to go in said cars or coaches to order, direct, manage, and control the said train of cars or coaches in all things for the defendants as fully and to the same extent as the defendants themselves could have done had they been personally present acting for themselves from Pass Christian aforesaid to New Orleans aforesaid.

Sixth. That then and there, on the day and year first aforesaid, at Pass Christian aforesaid, at the special instance and request of the defendants, the plaintiff entered into one of said cars or coaches of the defendants for the defendants to take care of the plaintiff and of all things of the plaintiff that the plaintiff did then rightfully and lawfully take with her into said car or coach to keep in her immediate possession, custody, and control, and for the defendants to safely carry and convey the plaintiff and all things of the plaintiff that the plaintiff did then rightfully and lawfully

5 take with her into said car or coach from Pass Christian aforesaid to New Orleans aforesaid for certain hire and reward then and there paid by the plaintiff to the defendants; and the plaintiff avers that the defendants then and there received the plaintiff in said car or coach for the purposes aforesaid.

Seventh. That the plaintiff then and there carried in her hand into said car or coach a certain leathern bag of the kind, pattern, size, and description usually carried by women in the plaintiff's condition and station in society, in which leathern bag there *was* then and there things of great value, to wit, nine thousand eight hundred and seventy-five dollars, lawful money, the property of the plaintiff, as follows, to wit: Current bank notes, lawful money of the United States, of the value of five thousand eight hundred dollars; one set of diamond ear-ings, of the value of two thousand five hun-

6 dred dollars; one diamond breastpin, of the value of one thousand dollars; one diamond lace-pin, of the value of two hundred dollars; one diamond finger-ring, of the value of three hundred dollars; one pair of eyeglasses and gold chain, of the value of twenty-five dollars, and one onyx rosary mounted in silver, of the value of fifty dollars, all of which money and things the plaintiff was taking in her immediate custody from her summer residence, at Pass Christian, to her winter residence, at New Orleans, as aforesaid.

Eighth. That then and there it became and was the duty of the defendants to allow the plaintiff to keep in her immediate possession, custody, and control all the things above mentioned, and it was also the duty of the defendants to abstain from doing anything which could or might interfere with the plaintiff's immediate possession, custody, and control of the things above mentioned, and it was also the duty of the defendants to abstain from doing anything

7 which could or might tend to injure or to cause the loss of the things above mentioned, and it was also the duty of the

defendants to forbear doing anything which could or might prevent the plaintiff from retaking into her possession the things above mentioned if by any mischance or accident the plaintiff should lose possession of the things above mentioned; and it was also the duty of the defendants to carry the plaintiff and the things in her possession as aforesaid from Pass Christian aforesaid to New Orleans aforesaid with reasonable care and diligence and without unreasonable delay.

Ninth. That the plaintiff being compelled to occupy a seat close to an open window in said car or coach, a fierce cold wind came through said open window upon the plaintiff, and the plaintiff, being compelled to close said window to exclude said wind, attempted to close it while she held said leathern bag with said things therein in her hand, and while plaintiff attempted to close said
8 window as aforesaid said leathern bag and said things therein as aforesaid, by some cause unknown to the plaintiff, accidentally fell from her hand through said open window and upon the defendants' road.

Tenth. That the said James Dowling being then and there present in said car or coach and close to said open window, the plaintiff requested the said James Dowling to stop the said train of cars and coaches and to allow the plaintiff to depart from said car or coach and retake the said leathern bag and the things above named, and the plaintiff immediately notified and cautioned the said James Dowling that the said leathern bag contained things of very great value, the property of the plaintiff, but the said James Dowling, acting as aforesaid for the defendants, refused to stop said train of cars or coaches, although nothing did then hinder or prevent him from stopping them, and refused to allow the plaintiff to depart from the said car or coach, and refused to allow the plaintiff
9 to retake said leathern bag and the things therein as aforesaid, and the said James Dowling, for the defendants, then and there caused the said train of cars or coaches to proceed at a great speed, and continued to carry the plaintiff, against the plaintiff's protestations, away from the place where said leathern bag fell as aforesaid for a long distance, to wit, three miles, to wit, Bay St. Louis, at which place the said James Dowling stopped said train of cars for the defendants, and the plaintiff immediately dispatched a trusty person to the place where said leathern bag had fallen on the defendants' road as aforesaid, but before the said person did or could arrive at the said place some person or persons, to the plaintiff unknown, stole and carried away the said leathern bag and the things aforesaid.

And so the plaintiff says that the said defendants did not nor would take care of the plaintiff and of the things the plain-
10 tiff rightfully and lawfully had in her immediate custody and control in said car or coach as aforesaid, nor would the defendants allow the plaintiff to keep the same in her immediate custody, control, and possession, nor would the defendants abstain from doing or forbear doing that which would cause the loss of the things above mentioned, but, on the contrary, the defendants, know-

ing that said leathern bag and the rings therein might be stolen, did wilfully and in gross and wanton disregard of that danger carry the plaintiff away as aforesaid from the said leathern bag and the things above mentioned, and did prevent the plaintiff from retaking the same, although nothing did hinder or prevent the defendants from allowing the plaintiff to depart from said car or coach, and so the plaintiff avers that the said leathern bag and the things therein as aforesaid, being of the value aforesaid, to wit, nine thousand eight hundred and seventy-five dollars, were stolen, and were wholly
11 lost to the plaintiff by the gross negligence of the defendants as aforesaid.

Wherefore plaintiff prays that the defendants be cited to appear and true answer make to all and singular the matters aforesaid, and that the defendants be condemned to pay the plaintiff the said sum of nine thousand eight hundred and seventy-five dollars, with lawful interest from judicial demand, and that the plaintiff have judgment for said sum, with costs of suit, and that the plaintiff have such other and general relief in the premises as the court here is competent to give in the premises.

And the plaintiff will ever pray.

(Signed) O. B. SANSUM,
Attorney for Plaintiff.

I hereby authorise and assist my wife, the above-named Catherine Henderson, to institute and prosecute the above suit.

New Orleans, January 16th, 1884.

(Signed) JOHN HENDERSON.

Citation. Issued 16 *January*, 1884.

UNITED STATES OF AMERICA,
Eastern District of Louisiana:

12 Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CATHERINE HENDERSON
v.
THE LOUISVILLE & NASHVILLE R. R. Co. } No. 10460.

The President of the United States of America to The Louisville and Nashville Railroad Company:

You are hereby summoned to comply with the demand contained in the petition of which a copy accompanies this citation, or to deliver your answer to the same in the office of the clerk of the circuit court of the United States, fifth circuit and eastern district of Louisiana, in the city of New Orleans, in ten days after the service hereof, which delay is increased one day for every ten miles your place of residence is distant from New Orleans, the place where the court is held.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at the city of New

Orleans, this 16th day of January, A. D. one thousand eight
13 hundred and eighty-four, and of the Independence of the United States of America the 108th year.

Teste:

[SEAL.] (Signed) F. A. WOOLFLEY, *Clerk.*

Marshal's Return. Filed January 31st, 1884.

Received Jan. 18, 1884, by the U. S. marshal, and on the 30th day of Jan., 1884, I served a true copy of the within petition and accompanying citation on the L. & N. R. Road by handing the same — J. T. Harrahan, the sup't of the within-mentioned railroad, by handing the same to him in person at the office on the levee, foot of Girod St., in this city.

(Signed) J. R. G. PITKIN,
Marshal E. D. of La.,
DAN. A. ROSE,
D'y U. S. Marshal.

Exception. Filed Febr'y 11, 1884.

United States Circuit Court.

CATHERINE HENDERSON
v.
THE LOUISVILLE & NASHVILLE RAILROAD COMPANY. } No. 10460.

Now comes defendant and excepts to plaintiff's petition herein that plaintiff has no just and legal cause of action; that her
14 petition discloses that if she had in her possession any such property as is described (which is denied) the same was in her personal custody and was never delivered to the railroad company, and if she suffered any loss it was from her own act and not from any fault or negligence of the railroad company.

Wherefore defendant prays that this exception may be filed (with permission to answer, if necessary), and that said exception may be maintained and plaintiff's suit dismissed, and for equitable relief.

(Signed) BAYNE & DENEGRE,
For Defendants.

Thos. L. Bayne, being sworn, says that he is of counsel for defendant, and that he believes that the above exception is good in law and should be maintained and is not interposed for delay.

(Signed) THOS. L. BAYNE.

Subscribed and sworn before me Feb'y 11th, 1884.

(Signed) F. A. WOOLFLEY,
Commissioner United States Circuit Court,
Eastern District of Louisiana.

15 *Answer. Filed* 13 *March*, 1884.

United States Circuit Court.

Mrs. CATHERINE HENDERSON
v.
THE LOUISVILLE & NASHVILLE RAILROAD COMPANY. } No. 10460.

Now comes The Louisville and Nashville Railroad Company made defendant herein, and reserving and insisting upon the exception heretofore filed, and, if said exception is overruled, then, for answer—

Defendant denies the allegations of plaintiff as to her right to sue or recover herein, and denies all and singular the allegations of said plaintiff, except as may be hereinafter specially admitted.

And specially denies every allegation tending to charge said defendant with or for the alleged loss, and avers that if any loss occurred (which is denied) it arose from want of prudence and care on the part of plaintiff; and in reference to property which was in her personal and immediate care and custody and was never delivered to defendant as baggage or otherwise, and no notice was given
16 to defendant that plaintiff had any such property in her custody; that if plaintiff had any such money and other articles as she describes in her possession these were not such as could be denominated as passengers' usual baggage, nor such articles as defendant could be made liable for as baggage, even if she had the same in her possession and it was lost by her as described.

Defendant admits & avers that it is a railroad corporation engaged in running trains of cars several times daily between New Orleans, Mobile, Alabama; Nashville, Tennessee, and other cities for the transportation of passengers and the United States mails, and at the time of the alleged loss a second train of cars, with passengers and mail matter, was following in close proximity as usual to the train in which plaintiff alleges that she was riding, and any irregular stoppage of the forward train would have endangered the
17 lives of passengers and persons on both trains of cars as well as the destruction of said cars.

And defendant avers that if plaintiff suffered any loss (which is denied) the same resulted from her own imprudence and by her direct contributory negligence, and not from any fault of defendant.

Wherefore defendant asks for judgment in its favor, and that plaintiff's suit may be dismissed, and for all equitable and general relief.

(Signed) BAYNE & DENEGRE,
Attorneys for Defendant.

Hearing and Submission of Exception.

Extract from the Minutes, November Term, 1883.

NEW ORLEANS, SATURDAY, *March 22d*, 1884.

Court met pursuant to adjournment.

Present: Hon. Edward C. Billings, district judge.

CATHERINE HENDERSON
v.
LOUISVILLE & NASHVILLE R. R. Co. } No. 10460.

This cause came on to be heard on the exception herein filed
18 by the defendant—O. B. Sansum and E. Sabourin, for plaintiff; Bayne & Denegre, for defendant—and was argued by the said counsel for the parties and submitted; whereupon the court took time to consider.

Judgment Maintaining Exception.

Extract from Judgment Book, November Term, 1883.

NEW ORLEANS, WEDNESDAY, *April 9th*, 1884.

Court met pursuant to adjournment.

Present: Hon. Edward C. Billings, district judge.

CATHERINE HENDERSON
v.
LOUISVILLE & NASHVILLE R. R. COMPANY. } 10460.

This cause came on to be heard on the petition and the exception of the defendant to the same, and was argued by counsel. On consideration whereof it is ordered, adjudged, and decreed that the exception be maintained and the suit be dismissed with costs, but upon the application of O. B. Sansum, Esq., counsel for the plaintiff, *ore tenus*, the judgment was amended by adding the words "un-
19 less the plaintiff amend her petition so as to state a cause of action within five days.

Judgment rendered April 9th, 1884.

Judgment signed April 14th, 1884.

(Signed) EDWARD C. BILLINGS, *Judge.*

Amended Petition. Filed with Leave of Court April 14, 1884.

EASTERN DISTRICT OF LOUISIANA, *ss*

In the Circuit Court of the United States for the Eastern District of Louisiana. November Term, A. D. 1884.

CATHERINE HENDERSON, Plaintiff,
v.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Defendants.

And the said plaintiff, by leave of court here for this purpose first had and obtained, now comes into court here and makes this

her amended petition and avers that at the commencement of said suit plaintiff was and still is a citizen of the State of Louisiana and the defendants were a body corporate created and existing under the statutes of the State of Kentucky.

20 That heretofore, to wit, on the twenty-fifth day of October, A. D. 1883, the defendants were common carriers for hire of passengers and their luggage, and baggage, goods, and chattels on their railroad from Pass Christian, in the State of Mississippi, to New Orleans, in the State of Louisiana; and the plaintiff, to wit, on the day and year aforesaid, at Pass Christian aforesaid, became and was a passenger on a journey upon said defendants' said railroad from Pass Christian aforesaid to New Orleans aforesaid, and the defendants, as such common carriers, then and there received the plaintiff as such passenger into one of their cars upon their said railway, and divers goods and chattels, the property of the plaintiff, to wit, a certain leathern bag and its contents, to wit, divers jewels and current bank-bills, being part of the luggage and baggage of the plaintiff, of great value, to wit, nine thousand eight hundred and seventy-five dollars, to be safely and securely kept, carried, and conveyed by the defendants as such common carriers as

21 aforesaid, and at the end of said journey, to wit, at New Orleans aforesaid, to be safely and securely delivered up to the plaintiff for certain reward and hire then and there paid by the plaintiff to the defendants in that behalf.

And the plaintiff avers that the defendants did not safely keep, carry, and convey the said goods and chattels as aforesaid, nor did the said defendants safely carry and convey the said goods and chattels, nor deliver up the same to the plaintiff, although the said journey had ended and reasonable time for carrying, conveying, and delivering the said goods and chattels had elapsed before the commencement of this suit, and the plaintiff avers that by reason of the mere negligence, carelessness, and improper conduct of the defendants in the premises, and not by any want of any care of the plaintiff, the said goods and chattels being of the value aforesaid, became and were wholly lost to the plaintiff. Wherefore the plaintiff prays judgment for the said sum of nine thousand eight

22 hundred and seventy-five dollars, as she hath already prayed, and for general relief.

(Signed) O. B. SANSUM,
Pl'ff's Att'y.

Marshal's Return.

Received Apr. 14, 1884, by the U. S. marshal, and on same day, month, and year served a true copy of the within amended petition on Bayne & Denegre by leaving the same in the hands of Mr. Denegre, one of the law firm of Bayne & Denegre, in the city of New Orleans.

(Signed) J. R. G. PITKIN,
U. S. Marshal,
By JNO. H. SIMONDS,
D'y U. S. Marshal, East. Dist. of La.

Order to Serve Amended Petition and Ten Days to Answer.

Extract from Minutes, November Term, 1883.

NEW ORLEANS, MONDAY, *April 14th*, 1884.

Court met pursuant to adjournment.

Present: Hon. Edward C. Billings, district judge.

CATHERINE HENDERSON
v.
LOUISVILLE & NASHVILLE R. R. Co. } 10460.

23 This day in open court came O. B. Sansum, Esq., and filed plaintiff's amended petition.

Whereupon, upon the motion of said counsel for the plaintiff, it was ordered by the court that a copy of the petition as amended be served upon the defendant, and that said defendant have 10 days in which to answer.

Exception. Filed 23 *April*, 1884.

United States Circuit Court.

CATHERINE HENDERSON
v.
THE LOUISVILLE & NASHVILLE RAILROAD COMPANY. } No. 10460.

Now comes the defendant and denies the right of the plaintiff herein to file an amended petition after the original petition herein has been dismissed, as shewn by the opinion and judgment of the court, which is filed herewith as part of this exception which this defendant presents to this court.

And this defendant excepts to the supplemental petition herein on the ground that it is at variance and inconsistent with the original petition, in this, that in the original petition plaintiff
24 avers that she was merely a passenger, paying usual price as a passenger, from Pass Christian to New Orleans, and that the articles described in her petition were held and kept in her immediate possession and control and custody, and that said articles were never delivered to the railroad company to be transported as baggage. And in the supplemental petition an effort is made to set up something differing entirely from this, and at variance with the original allegations, particularly in this, that it is alleged that said plaintiff was received "as a passenger into one of these cars upon their said railroad, and divers goods and chattels," etc.

And this defendant excepts that plaintiff is estopped from denying now the judicial allegation and admission made in her original petition, that the articles described were in her immediate possession and custody and control, and were not delivered to the railrood company; and defendant avers that under said original alle-
25 gations, as determined by this honorable court, said plaintiff has no cause of action against this defendant.

This defendant further excepts to said supplemental petition on the ground that the articles described and which were in her own possession were not baggage, and defendant cannot be held liable for the same as baggage; that the articles inventoried were not such as are usually carried as baggage; that defendant was not notified of the carriage of any such articles, nor paid for their transportation, and cannot be held liable for the same; that, taking the original and supplemental petition and comparing them, it will be found that they are contradictory and at variance with each other, and that plaintiff has no just or proper cause of action against this defendant.

Wherefore defendant asks that these exceptions should be maintained and plaintiff's suit be dismissed; but if said exceptions are overruled, then defendant asks leave to answer and for all equitable relief.

26 (Signed) BAYNE & DENEGRE,
Attorneys for Defendant.

27 *Hearing and Submission of Exception.*

Extract from Minutes, April Term, 1884.

NEW ORLEANS, SATURDAY, *June 7th*, 1884.

Court met pursuant to adjournment.
Present: Hon. E. C. Billings, district judge.

Mrs. HENDERSON
v.
LOUISVILLE & NASHVILLE R. R. Co. } No. 10460.

The exception to the amended petition and the motion to strike out said amended petition came on to be heard and, having been argued by counsel for plaintiff and defendant, the court took time to consider.

Order Sustaining Exception to Amended Petition.

Extract from Minutes, April Term, 1884,

NEW ORLEANS, WEDNESDAY, *June 11th*, 1884.

Court met pursuant to adjournment.
Present: Hon. E. C. Billings, dist. judge.

Mrs. CATH'NE HENDERSON
v.
LOUISVILLE & NASHVILLE R. R. Co. } No. 10460.

This cause came on to be heard on the exception to the amended petition and was argued by counsel.

28 On consideration thereof, and for reasons assigned in writing, it is ordered by the court that the order permitting the plaintiff to file the amended petition be so modified as to provide that the last petition is to be deemed and to have effect only as an

addition to the original petition, and that the exception to said petition as so amended be sustained and said amended petition dismissed, and that defendant have judgment for costs.

Reasons. Filed 11 *June*, 1884.

Mrs. HENDERSON
v.
LOUISVILLE & NASHVILLE R. R. Co. } 10460.

E. C. BILLINGS, *Judge:*

This cause being on the law side of the court is governed by the rules of pleading which prevail in the highest courts of the State of Louisiana. There can therefore be no addition of a count which is to be considered and passed upon as a statement of a distinct cause of action separate from the other averments. The plaintiff states
29 the facts which constitute his cause of action in one pleading and cannot state the facts in a petition and then substantially vary them, either by omission or addition, so as, in effect, to contradict his petition.

The amended petition considered by itself states a complete cause of action, viz: That the defendants received as common carriers a certain leathern bag, the property of the plaintiff, as her baggage, and undertook to transport and deliver the same at New Orleans. Here is the statement of a good contract. The breach of the same is equally well stated—*i. e.*, that the defendants through their negligence never did deliver.

But this is an amendment to a petition which has set out the acts and doing- of the defendants minutely, out of which such an undertaking arose, if any ever existed, and those acts and doings show that the defendants received only in a permissive way—*i. e.*, received only as property the custody of or responsibility for
30 which was altogether with the plaintiff, and that they never did undertake to deliver. How, then, can the plaintiff be permitted to amend a petition by stating a legal proposition, when the facts of the case as *he* has stated them in the original petition, if established on the trial, would completely disprove that legal proposition.

The order permitting the plaintiff to file the amended petition is hereby modified so as to provide that the last petition is to be deemed and to have effect only as an addition to the original petition, and then it will appear, as it ought to appear, that the amendment is the addition merely of the inference which the plaintiff draws in law from the facts set forth in *his* original petition, and that such an inference does not in law arise from those facts, but, the contrary, to wit, that the defendants never did undertake to deliver, except as property in the custody and at the risk of the plaintiff, and that the man-
31 ner of the loss was such as in no degree to violate that agreement.

The order to allow the filing the amended petition is amended in accordance with this opinion, and the exception to the petition as so amended is maintained.

Motion and Order for Writ of Error.

Extract from Minutes, April Term, 1884.

NEW ORLEANS, *June 13th*, 1884.

Court met pursuant to adjournment.
Present: Hon. E. C. Billings, district judge.

CATHERINE HENDERSON
v.
LOUISVILLE & NASHVILLE R. R. Co. } 10460.

On motion of plaintiff's attorney it is ordered that a writ of error to the Supreme Court of the United States be issued in this cause, returnable on the first day of the next term of said Court, upon plaintiff giving bond in the penal sum of $200, and that said writ of error operate as a supersedeas.

Bond for Writ of Error. Filed 16 *June*, 1884.

32 Know all men by these presents that we, Catherine Henderson, as principal, and John Henderson, as surety, are held and firmly bound unto The Louisville and Nashville Railroad Co. in the full and just sum of two hundred dollars, to be paid to the said Louisville and Nashville Railroad Co. or their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this sixteenth day of June, in the year of our Lord one thousand eight hundred and eighty-four.

Whereas lately at a circuit court of the United States, fifth judicial circuit, holding sessions in and for the eastern district of Louisiana, the said Catherine Henderson — in a suit depending in said circuit court, wherein the said Catherine Henderson is plaintiff and the said Louisville and Nashville Railroad Co. —, judg-
33 ment was rendered against the plaintiff, and the said plaintiff having obtained a writ of error and filed a copy thereof in the clerk's office of the said circuit court to reverse the judgment in the aforesaid suit, and a citation directed to the said Louisville and Nashville Railroad Co., citing and admonishing them to be and appear at the Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Catherine Henderson shall prosecute her writ to effect and answer all damages and costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) CATHERINE HENDERSON, [L. S.]
By her att'y, O. B. SANSUM. [L. S.]
(Signed) JOHN HENDERSON. [L. S.]

Bond approved.
June 16, 1884.
(Signed) EDWARD C. BILLINGS, *Judge.*

34 UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE.

I, Edward R. Hunt, clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, do hereby certify that the foregoing 33 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced, on the trial of the case of Mrs. Catherine Henderson *versus* The Louisville and Nashville Railroad Company, No. 10460 of the docket of the said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 24th day of June, A. D. 1884.

[Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.]

E. R. HUNT, *Clerk.*

I, Edward C. Billings, United States judge for the eastern district of Louisiana, do certify that Edward R. Hunt, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 24th day of June, A. D. 1884.

EDWARD C. BILLINGS, *Judge.*

35 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit and holding sessions for the eastern district of Louisiana, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between Mrs. Catherine Henderson and The Louisville and Nashville Railroad Company, a manifest error hath happened, to the great damage of the said Mrs. Catherine Henderson, as by her complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 16th day of June, in the year of our Lord one thousand eight hundred and eighty-four.

[Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.]

E. R. HUNT,
Clerk of the United States Circuit Court
for the Eastern District of Louisiana.

36 [Endorsed:] United States circuit court. No. 10460. Mrs. Catherine Henderson, pl'ff in error, *versus* The Louisville & Nashville R. R. Co., defendant in error. Writ of error. Filed June 16th, 1884. E. R. Hunt, clerk.

37 THE UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

The President of the United States to the Louisville and Nashville Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, wherein Mrs. Catherine Henderson is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said Catherine Henderson, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 16th day of June, in the year of our Lord one thousand eight hundred and eighty-four.

EDWARD C. BILLINGS, *Judge.*

38 [Endorsed:] United States circuit court. No. 10460. Mrs. Catherine Henderson, plaintiff in error, *vs.* The Louisville & Nashville Railroad Company, defendant in error. Citation.

Marshal's Return.

Received June 16th, 1884, by United States marshal, and on the 21st day of June, 1884, served a duplicate of the within citation in error on the Louisville and Nashville Railroad Company, defendant in error, by leaving the same in the hands of J. T. Harahan, general superintendent of said Louisville and Nashville Railroad Company, said Harahan being authorized to transact all business for said railroad company.

J. R. G. PITKIN,
U. S. Marshal, East. Dist. of La.,
By DAN. A. ROSE, *Deputy.*

Dan. A. Rose, being duly sworn, doth depose and say that he is a lawful deputy of J. R. G. Pitkin, U. S. marshal for the eastern district of Louisiana, and that the service and return, as set forth hereon, of the within citation in error is true and correct.

DAN. A. ROSE,
D'y U. S. Marshal.

Subscribed and sworn before me June 24, 1884.

E. R. HUNT,
Commissioner United States Circuit Court.

39 *Assignment of Errors.*

In the Supreme Court of the United States. October Term, A. D. 1884.

CATHERINE HENDERSON, Pl'f in Error,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendants in Error.

And now at this time comes the said plaintiff in error and assigns for error as follows, to wit:

1st. The circuit court erred in sustaining defendants' exceptions to the plaintiff's original petition.

2nd. The circuit court erred in sustaining defendants' exceptions to the plaintiff's amended petition.

3rd. The circuit court erred in amending the record for the purpose of restricting and limiting the plaintiff's right to amend her petition.

4th. The circuit erred in dismissing plaintiff's action.

5th. The circuit court erred in giving judgment in the cause against the plaintiff, and she prays that the said judgment be reversed and that she have judgment for her.

Damages, $9,875.

O. B. SANSUM,
Att'y for Pl'f in Error.

40 [Endorsed:] No. —. Supreme Court U. S. Catherine Henderson, pl'f in error, *vs.* Louisville & Nashville R. R. Co. Transcript. O. B. Sansum, for pl'f in error.

Endorsed on cover: E. Louisiana C. C. U. S. No. 27. Catharine Henderson, plaintiff in error, *vs.* The Louisville and Nashville Railroad Company. Filed 14th July, 1884.

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Office Supreme Court U. S.
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JAMES. H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1887.

No. 27.

CATHERINE HENDERSON, PLAINTIFF IN ERROR,

versus

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY, DEFENDANTS IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

O. B. SANSUM,
Attorney for Plaintiff.

T. H. Thomason, Printer, No. 33 Natchez Street, N. O.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1887.

No. 27.

CATHERINE HENDERSON, PLAINTIFF IN ERROR,

versus

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY, DEFENDANTS IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

This case comes to this Court upon the plaintiff's petition, and her amended or supplementary petition, and the defendants' exception (demurrer) thereto. Under the law of Louisiana, a defendant's exception to a plaintiff's petition is, in effect, a demurrer. It may be general or special.

The exception is general, for it alleges that the plaintiff has no just and legal cause of action. (*Record, 14*).

Subsequently (*Record*, 15), defendants answered plaintiff's petition, reserving their right to insist upon their exception (*demurrer*) and, in that answer, they

traversed all the allegations stated in the plaintiff's petition, excepting only her allegation that the defendants are a corporation.

A week after the tendering of their issue upon the facts, they set the case down for a hearing upon their exception, and it was heard upon the exception only. (*Record, 18*). Subsequently (*Record, 19,*) the Court gave judgment on that exception against the plaintiff, and dismissed her suit, but allowed her to amend her petition within five days from April 9th. Plaintiff, by leave of Court, filed her amended petition within the time allowed. A copy of it, by order of Court, was served on defendants, and they were allowed ten days to answer it. To this they filed a peculiar paper which they style an exception, in which they argue certain reasons why plaintiff ought not to file an amended petition. The case was then heard upon the amended petition (*Record, 29*), and the exception to it was sustained, and the amended petition was dismissed with judgment in favor of defendants for costs (*Record, 28*).

The whole case may be stated in a very few words.

The plaintiff had passed the summer at Pass Christian—and was returning to her winter residence in New Orleans. She placed her jewels and money in a small leathern bag (a bag commonly carried in the hands of women) and entered the defendants' car as a passenger for New Orleans at Pass Christian. The train had started, the bag with her jewels and money accidently fell through the car window; she could not

jump after it while the train was in motion; the conductor of the train being close to her when the bag fell through the window she begged him to stop the train and let her get off; she told him that the contents of the bag were of great value. He refused to stop the train, carried her on to the next station, three miles away from her jewels and money,—they were stolen from the place where they had fallen before she could get a person back to them. Nothing prevented the stopping of the train—the stopping of it could have been accomplished in less than thirty seconds, and could have proceeded without waiting for her—and she could have retaken her property.

Assignment of Errors.

1st. The Circuit Court erred in sustaining defendants' exception to plaintiff's original petition.

2d. The Circuit Court erred in sustaining defendants' exception to plaintiff's amended petition.

3d. The Circuit Court erred in amending the record for the purpose of limiting and restricting the plaintiff's right to amend her petition.

4th. The Circuit Court erred in dismissing plaintiff's action.

5th. The Circuit Court erred in giving judgment in the cause against the plaintiff.

Points and Argument.

I.

The first error assigned presents the question,

whether a cause of action is stated in the original petition.

Defendants are charged as common carriers of passengers for hire; that being so, they made ready a train of cars at Pass Christian to carry passengers to New Orleans and invited all persons to use them as passengers; that all persons accepting the invitation had the right to take things of whatsoever value with them and to keep them in their immediate possession.

That defendants appointed one Dowling to go in the cars to manage and control them for the defendants, as fully and to the same extent as the defendants themselves could have done had they been personally present, acting for themselves.

That at defendants' special instance and request plaintiff entered one of the cars for the defendants to take care of the plaintiff and of all things the plaintiff did there rightfully and lawfully take with her into the car, for the defendants to carry and convey the plaintiff and the things that the plaintiff did rightfully and lawfully take with her into the car, from Pass Christian to New Orleans, for certain hire and reward, then and there paid by the plaintiff to the defendants;—averment, *"the defendants received the plaintiff for the purpose aforesaid."*

That the plaintiff carried in her hand, into the cars a certain leathern bag of the kind, pattern, size and description usually carried by women in the plaintiff's condition and station in society, in which leathern bag there were things of great value (particularly de-

scribed) all of which the plaintiff was taking in her immediate custody from her summer residence to her winter residence in New Orleans.

Averment;—It was the defendants' duty to abstain from doing anything which could or might tend to injure or to cause the loss of the things described, and it was the defendants' duty to forbear doing anything which could or might prevent the plaintiff from retaking into her possession the things described, if by mischance or accident, the plaintiff should lose possession of them, and it was the defendants' duty to carry the plaintiff and the things described and in her immediate possession from Pass Christian to New Orleans with reasonable care and diligence and without unreasonable delay.

That plaintiff, being in a seat in the car close to an open window, a fierce, cold wind came through the window; that in attempting to close the window to exclude the wind she held the bag in her hand, and by some cause unknown the bag with the jewels and money described accidently fell from her hand through the open window upon defendants' road.

That Dowling, the conductor, being *close* to the open window, the plaintiff notified and cautioned him that the bag contained things of great value, the property of plaintiff, and requested him to stop the train and allow the plaintiff to depart and retake the things (described), but he refused to stop the train, though nothing did then hinder or prevent him from stopping it, and *he refused to allow the plain-*

tiff to retake the bag and the things described; *averment*, "and the said James Dowling for the defendants, then and there caused the said train of cars to proceed at a high rate of speed, and continued to carry the plaintiff against the plaintiff's protestations, away from the place where said leathern bag fell as aforesaid, for a long distance, to wit., three miles, to-wit, at Bay St. Louis, at which place said James Dowling stopped said train of cars for the defendants, and the plaintiff immediately dispatched a trusty person to the place where said leathern bag had fallen on the defendants' road as aforesaid, but before said person did or could arrive at said place, some person or persons to the plaintiff unknown stole and carried away said leathern bag and the things aforesaid."

"And so the plaintiff says the said defendants did not nor would take care of the plaintiff and of the things the plaintiff rightfully and lawfully had in her immediate custody, control and possession, nor would the defendants abstain from doing or forbear doing that which would cause the loss of the things above mentioned, but on the contrary thereof, the defendants, knowing that the said leathern bag and the things therein might be stolen, did wilfully, and in gross and wanton disregard of that danger, carry the plaintiff away, as aforesaid, from said leathern bag and the things above mentioned, and did prevent the plaintiff from retaking the same, although nothing did hinder or prevent the defendants from allowing the plaintiff to depart from said car or coach; and so

the plaintiff avers that the said leathern bag and the things therein, as aforesaid, being of the value of $9875, were wholly lost to the plaintiff by the gross negligence of the defendants.

For all the purposes of the defendants' exception, all the foregoing allegations are admitted.

The rule is indisputable that a demurrer admits every fact well pleaded.

To summarize, the defendants' exception admits the preparing of the train to carry passengers from Pass Christian to New Orleans; admits that defendants invited all persons to use the train as passengers to New Orleans; admits that all passengers had the lawful right to take with them in their immediate custody and possession all things of value and to keep them in their immediate possession; admits that Dowling was defendants' agent to go in the cars to direct, manage and control them for the defendants as fully and to the same extent as the defendants could have done had they been personally present; admits that the plaintiff entered the car for the defendants to carry her, and the things she then and there had in her possession, from Pass Christian to New Orleans; admits that defendants received the plaintiff for the purposes mentioned; admits that the plaintiff carried in her hands into the car a leathern bag containing $9875 of jewelry and money; admits defendants' duty to take care of and to carry the plaintiff and the things she had in her possession, to New Orleans; admits the defendants' duty to abstain

from doing anything which might tend to injure or cause the loss of the things described; admits defendants' duty to forbear doing anything which could or might prevent plaintiff from retaking the things described, if by mischance or accident the plaintiff should lose possession of them; admits that in plaintiff's attempt to close the window in the car, the bag and contents, by a cause unknown, accidentally fell from her hand through the open window upon defendants' road; admits immediate notice and caution to defendants' authorized agent, that the things were of great value, and a request to stop the train; admits his refusal, and his brutal, persistent dragging the plaintiff away from her property, against her protestations; admits that the defendants carried her three miles away from $9875 worth of jewels and money, and that they were stolen on defendants' road. More than this, the petition states, that the defendants, knowing that the said leathern bag and the things therein might be stolen, did wilfully and in gross and wanton disregard of that danger, carry the plaintiff away from the said leathern bag and the things above mentioned, and did prevent the plaintiff from retaking the same, although nothing did hinder or prevent the defendants from allowing the plaintiff to depart from said car or coach, and so the plaintiff avers that the said leathern bag and the things therein contained being of the value of $9875, were wholly lost to the plaintiff by the gross negligence of the defendants. This averment is admitted by the demurrer!

No one will argue that the owner of money and jewels, being a passenger on a railway, has no right to carry such things into a car or carriage furnished by the common carrier for the use of passengers. Conceding the right of the owner of such things to take them into the carriage and to keep them under and in his immediate custody and control, does the carrier, as carrier, owe no duty at all to the things mentioned?

Conceding that defendants owed no duty, as carrier, to the things mentioned, could the defendants destroy them by an act of positive misfeasance in the nature of a forcible trespass? Or could the defendants accomplish the loss of the things mentioned by such gross negligence as would approximate wantonness?

In the case of *First National Bank vs. Marietta Railroad*, 20 Ohio State Reports, page 279, Mr. Justice Scott said, "we do not call in question the right of a passenger to carry about his person, for the mere purpose of transportation, large sums of money, or small parcels of great value, without communicating the fact to the carrier or paying anything for their transportation. But he can only do so at his own risk in so far as the acts of third persons or even ordinary negligence on the part of the carrier or his servants is concerned."

That case went up on a petition and a demurrer to it. The case failed because the petition stated a case of ordinary negligence only, which caused the destruction of money (bank bills) on the person of the

passenger. But in giving judgment upon the petition, the learned Judge said: "*The case made by the petition is not one in which the plaintiff's property has been destroyed by an act of positive misfeasance in the nature of a forcible trespass. The defendant is not charged with its wilful destruction, nor with such gross negligence as would approximate wantonness.*"

In the case at bar, the petition charges: "That the said James Dowling being then and there present in said car or coach, close to said open window, the plaintiff requested the said James Dowling to stop the said train of cars and coaches and to allow the plaintiff to depart from said car or coach and retake the said leathern bag and the things above named, and the plaintiff immediately notified and cautioned the said James Dowling that the said leathern bag contained things of very great value the property of the plaintiff, but the said James Dowling, acting as aforesaid for the defendants, refused to stop said train of cars or coaches although nothing did then hinder or prevent him from stopping them, and refused to allow the plaintiff to depart from said car or coach, and refused to allow the plaintiff to retake said leathern bag and the things therein as aforesaid, and the said James Dowling for the defendants then and there caused the said train of cars or coaches to proceed at a great speed and continued to carry the plaintiff, against the plaintiff's protestations, away from the place where said leathern bag fell as aforesaid, for a long distance to-wit., three miles, to-wit.,

Bay St. Louis, etc. And so the plaintiff says that the said defendants did not nor would take care of the plaintiff and of the things rightfully and lawfully had in her immediate custody and control in said car or coach as aforesaid, nor would the defendants allow the plaintiff to keep the same in her immediate custody, control and possession, nor would the defendants abstain from doing that which would cause the loss of the things above mentioned, but, on the contrary, the defendants knowing that said leathern bag and the things therein might be stolen did wilfully and in gross and wanton disregard of that danger carry the plaintiff away, as aforesaid, from said leathern bag and the things above mentioned and did prevent the plaintiff from retaking the same although nothing did hinder or prevent the defendants from allowing the plaintiff to depart from said car or coach, and so the plaintiff avers that said leathern bag and the things therein as aforesaid, being of the value of $9875, were stolen and wholly lost to the plaintiff by the gross negligence of the defendants as aforesaid."

The foregoing averments carry the case at bar over the defect suggested by the Court in the case of *First National Bank vs. Marietta Railroad* (*supra*).

If the plaintiff contributed to the loss the defendants ought to plead it and prove it, but the Court below had no right to say, as matter of law, that the accidental falling of the bag with its contents through the car window is a fault which defeats her right of action.

If the defendants, under the then existing circumstances, could not or ought not to have stopped the train, they ought to plead and prove the facts, but the court below has no right to declare, as matter of law, that they were not bound to stop.

So long as the defendants were ignorant of the presence of plaintiff's jewels and money upon their premises, no duty in respecting them was cast upon defendants; but, so soon as they (the conductor whom they authorized to act for them) knew that the money and jewels had accidentally fallen upon the road, then they were bound to do what a reasonably prudent person, acting for himself under the same or similar circumstances, would have done to prevent loss and damage to them. If, under the same circumstances, a reasonably prudent person acting for himself would have stopped the train and let the plaintiff depart from it to retake her property, then it was defendants' duty to do the same, and their failure to do it is *contra* the maxim *sic utere tuo, ut alienum non lædas.*

The case of Butcher vs. London Ry. Co., 16 C. B. 15, shows a man and his wife going in a railroad car to London. The man carried a small carpet sack into the car and kept it on his lap during the trip. There was four or five hundred pounds sterling money in it. Having reached his destination he debarked, and on being asked if he wanted a cab he delivered the sack to the person who inquired, told him to get a cab, deposit the sack in the cab and return to assist with the luggage. The man returned, assisted with the luggage,

but the cab, carpet sack and money had vanished and were never heard of. The Court of Queen's Bench held the evidence sufficient to uphold a verdict for the plaintiff.

And, in *Richards vs. London Railway, 7 C. B. 839,* the plaintiff's wife carried a box of jewels into the car and kept them under the seat. On arriving at her destination her luggage was removed by the defendants' servants to her carriage, but, in looking for the jewelry, after her arrival at her house, the box could not be found. Whether it was taken out of the railway carriage to her own carriage did not appear in the evidence; but the Court held this evidence enough to support a verdict for the plaintiff. I cite these cases to show that the carrier of passengers is a common carrier *of the things kept in the railway carriage in the immediate custody* (*in the hands*) *of the passengers.*

In the case of *Butcher vs. London Railway Co.* (*supra*) Mr. Justice Creswell said, "the circumstance of this carpet bag having been placed in the carriage with the plaintiff, or by him, seems, according to the case of *Robinson vs. Dunmore,* to make no difference." Now, in that case, (2 Bos. and Puller, 416,) the plaintiff kept his portmanteau in his own custody, and it was lost, yet the court held the carrier liable for its loss.

II.

The Court certainly erred in sustaining defendants' exception to plaintiff's amended petition.

For, conceding that plaintiff's original petition failed to set out a cause of action, it follows, as matter of course, plaintiff might state facts in another count which would present a cause of action. The learned Judge who sustained the exception to the amended petition declares that plaintiff's amended petition is good in law. He says in his opinion (Record, 29), "the amended petition, considered by itself, states a complete cause of action." And then, to justify his dismissal of the case, he adds: "But this is an amendment to a petition which has set out the acts and doings of the defendants minutely out of which such an undertaking arose, if any ever existed, and those acts and doings show that the defendants received only in a permissive way, *i. e.* received only as property, the custody of, or responsibility for, which was altogether with the plaintiff, and they never did undertake to deliver. How then can the plaintiff be permitted to amend a petition by stating a legal proposition, when the facts of the case, as he has stated them in the original petition, if established at the trial, would completely disprove those legal propositions."

This is an error patent on its face, for the amended petition does not state a legal proposition. It states facts only—facts which show "a complete cause of action, viz: that the defendants received, as common carriers, a certain leathern bag, the property of the plaintiff, as her baggage, and undertook to transport and deliver the same at New Orleans. Here is the statement of a good contract. The breach of the same

is equally well stated, *i. e.*, that the defendants, through their negligence, never did deliver."

According to the court's opinion the amended petition is good in law. But the plaintiff was ordered out of court upon it!

The practice in all the Federal Courts has ever been to permit a plaintiff to amend the declaration or petition, so as to state a cause of action. Whether the facts to be proved on the trial will support the allegations stated, ought not to be decided as matter of law *in advance* of the trial. Neither ought a court to say, the plaintiff having stated certain facts as a cause of action, shall not be permitted to prove other facts, more or less, than those stated in the original petition.

Plaintiff respectfully submits, the court below erred in preventing plaintiff from submitting her cause to a jury, and she prays that the judgment be reversed and the cause be remanded.

O. B. SANSUM,
Attorney for Plaintiff.

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OCT 6 1887
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 27.

CATHERINE HENDERSON, PLAINTIFF IN ERROR,

VS.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

THOS. L. BAYNE,
GEORGE DENEGRE,
Attorneys for Defendants

L. GRAHAM & SON, PRINTERS, 101 GRAVIER ST., N. O.

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 27.

CATHERINE HENDERSON, PLAINTIFF IN ERROR,

vs.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

STATEMENT.

The plaintiff in this case claims that, being at Pass Christian, Mississippi, which is about fifty-eight miles from New Orleans, where she had a summer residence, she took passage to New Orleans on one of the regular cars of the Louisville and Nashville Railroad Company, having in her hand and in her own immediate custody a leather bag or satchel containing $5800 in current bank notes, lawful money of the United States; one pair diamond earrings, of the value of $2500; one diamond breastpin, of the value of $1000; one diamond lace pin, of the value of $200; one diamond fingerring, of the value of $300; one pair eye-glasses and gold chain, of the value of $25, and one onyx rosary, mounted in silver, of the value of $50, amounting in all, including currency and jewelry, to $9875; that in raising the window of the car, while she had

her bag in her hand, she dropped it through the window upon the road; that she notified the conductor and asked him to stop the train; that the conductor did not stop the train until it reached the next station, three miles distant, and that from there she sent back a messenger to look for her bag, and it could not be found.

This railroad, from Mobile to New Orleans, is one of the great thoroughfares of the country, established as a regular post road by act of congress, running daily many trains; and a large portion of the track between Pass Christian, Miss., and Bay St. Louis, Miss., the next station at which the train stopped, is over the waters of Mississippi Sound, and a long bridge of several miles intervenes between these two stations, where a collision would be almost inevitable from stopping a train out of its regular time.

The gravamen of plaintiff's complaint seems to be, not that the railroad company failed in its duty as a carrier of complainant, but rather that it was liable because it failed to stop its train or run it back to the place where the plaintiff alleges she dropped her bag. There was no delivery of the bag to the railroad company; on the contrary, the plaintiff alleges that she had it in her hand and in her own immediate custody, and that she had the right to keep it in her own custody, and that while she thus kept it she dropped it from her hand out of the window into the road. She now claims that the railroad company is liable for her money and her diamonds, because she says that she notified the conductor of her loss and asked him to turn back or stop his train, and he failed to do so. She al-

leges that she sent a trusty person "to the place where said leathern bag had fallen on defendants' road as aforesaid, but before said person did or could arrive at the place some person or persons, to the plaintiff unknown, stole and carried away the said leathern bag and the things aforesaid," thus seeking to hold defendants liable for the theft of some person unknown—a remote loss, for which defendants would not be liable under any circumstances. The proximate cause of her loss was the theft, according to her own allegation. This is the case as presented by the plaintiff, and we now respectfully refer to the pleadings.

PLEADINGS.

The plaintiff begins by declaring that she is authorized by her husband to prosecute this suit, and alleges that the defendants are common carriers; that passengers have a "right to take into said cars or coaches things of whatsoever value, and the same to keep in their immediate possession, custody and control;" that she "carried in her hand into said car or coach a certain leathern bag of the kind, pattern, size and description usually carried by women in the plaintiff's condition and station in society, in which leathern bag there was then and there things of great value—to-wit: $9875, lawful money, * * * as above described; all of which money and things the plaintiff was taking in her immediate custody from her summer residence at Pass Christian to her winter residence in New Orleans as aforesaid. That then and there it became and was the duty of defendants to allow plaintiff to keep in her immediate possession, custody and control all the

things above mentioned, and it was also the duty of the defendants to abstain from doing anything which could or might interfere with the plaintiff's immediate possession, custody and control of the things above mentioned; and it was also the duty of the defendants to abstain from doing anything which could or might tend to injure or to cause the loss of the things above mentioned; and it was also the duty of the defendants to forbear doing anything which could or might prevent the plaintiff from retaking into her possession the things above mentioned if, by any mischance or accident, the plaintiff should lose possession of the things above mentioned; and it was also the duty of the defendants to carry the plaintiff and the things above mentioned from Pass Christian aforesaid to New Orleans aforesaid with reasonable care and diligence and without unreasonable delay."

She further alleges that she occupied a seat near an open window in the car, and in attempting to close it while she held in her hand her leathern bag, by some cause unknown to her, the bag accidentally fell from her hand through the open car window; that she notified the conductor and requested him to stop the train of cars; that he refused to stop, and that she was carried to the next station, Bay St. Louis, three miles distant, and that she sent a "trusty person back to the place where said leathern bag had fallen on defendants' road, as aforesaid, but before said person did or could arrive at the said place some person or persons, to the plaintiff unknown, stole and carried away said leathern bag and things aforesaid."

The defendants filed an exception (in accordance

with the Louisiana practice), alleging that plaintiff's petition disclosed no legal cause of action against the defendants, and that if she had in her possession any such property as described (which was denied) the same was in her own personal custody and never delivered to the railroad company, and if she suffered any loss it was through her own fault and not through any neglect or fault of the railroad company.

The exception was argued and the suit ordered to be dismissed; but "upon the application of O. B. Sansum, counsel for the plaintiff, *ore tenus*, the judgment was amended by adding the words, 'unless plaintiff amend her petition so as to state a cause of action within five days.'"

An amended petition was filed, in which the plaintiff reiterated that she became a passenger on the railroad from Pass Christian to New Orleans, and that defendants received her and her leathern bag as common carriers and did not safely deliver them at their destination.

The defendants filed an exception to this supplemental petition, on the ground that it was at variance and inconsistent with the original petition, in this, that in the original petition plaintiff avers that she was merely a passenger, paying usual price as a passenger, from Pass Christian to New Orleans, and that the articles described in her petition were held and kept in her immediate possession and control and custody, and that said articles were never delivered to the railroad company to be transported as baggage; and in the supplemental petition an effort is made to set up something differing entirely from this and at variance with

the original allegations, in this, that it is alleged that said plaintiff was received "as a passenger into one of these cars upon their said railroad, and divers goods and chattels," etc.

And defendants except that plaintiff is estopped from now denying the judicial allegations and admissions made in her original petition, that the articles described were in her immediate possession, control and custody, and were not delivered to the railroad company; and defendants aver that under said original petition and its allegations, as determined by this honorable court, said plaintiff has no cause of action against these defendants.

The defendants further except to said supplemental petition on the ground that the articles described, and which were in her own possession, were not baggage, and defendants cannot be held liable for same as baggage; that defendants were not notified of the carriage of any such articles, nor paid for their transportation, and cannot be held liable for the same; that taking the original and supplemental petitions and comparing them it will be found that they are contradictory and at variance with each other, and that plaintiff has no just and proper cause of action against defendants.

Upon the hearing of this exception the court delivered an elaborate written opinion (which is reported in the Federal Reporter, vol. xx, page 430), and it was ordered by the court that the order permitting the plaintiff to file an amended petition be so modified as to provide that the last petition be deemed to have effect only as an addition to the original petition, and the plaintiff's exception to said petition as so amended be sustained,

and said amended petition be dismissed, and that defendants have judgment for costs.

The judge, on page 11 of the record, states: "This cause being on the law side of the court is governed by the rules of pleading which prevail in the highest courts of the State of Louisiana. There can therefore be no addition of a count which is to be considered and passed upon as a statement of a distinct cause of action, separate from the other averments. The plaintiff states the facts which constitute his cause of action in one pleading, and cannot state the facts in a petition and then substantially vary them, either by omission or addition, so as in effect to contradict his petition.

"The amended petition, considersd by itself, states a complete cause of action, viz.: that the defendants received as common carriers a certain leathern bag, the property of the plaintiff, as her baggage, and undertook to transport and deliver the same at New Orleans. Here is the statement of a good contract. The breach of the same is equally well stated—i. e., that the defendants through their negligence never did deliver.

But this is an amendment to a petition which has set out the acts and doings of defendants minutely, out of which such an undertaking arose, if any ever existed; and those acts and doings show that the defendants received only in a permissive way—i. e., received only as property, the custody of or reponsibility for which was altogether with the plaintiff—and that they never did undertake to deliver. How, then, can the plaintiff be permitted to amend a petition by stating a legal proposition, when the facts of the case, as she has stated them in her original petition, if established on the trial, would completely disprove the legal proposition?

The order permitting the plaintiff to file the amended petition is hereby modified so as to provide that the last petition is to be deemed and to have effect only as an addition to the original petition; and then it will appear, as it ought to appear, that the amendment is the addition merely of the inference which the plaintiff draws in law from the facts set forth in her original petition, and that such an inference does not in law arise from those facts, but the contrary—to-wit: that the defendants never did undertake to deliver, except as property in the custody and at the risk of the plaintiff, and that the manner of the loss was such as in no degree to violate that agreement.

The order to allow the filing of the amended petition is amended in accordance with this opinion, and the exception to the petition as so amended is maintained."

The defendants filed an answer (p. 15), but the case was dismissed upon the exceptions, and therefore could not be taken for trial upon the merits unless the judgment was reversed and the case remanded for such trial.

ARGUMENT.

In his opinion referred to above (20 Fed. Rep.) the judge says: "The question of law presented is, was the defendant, who was a common carrier of goods and persons—to-wit: a railroad company—responsible for the loss of a parcel of valuables, carried in the hands of a passenger, falling out of an open window without any fault of the carrier, for the reason that, upon notice and demand, it did not stop a train to recover the parcel until the train arrived at one of the usual and advertised stations? The propositions of law which the plaintiff must maintain in order to allow an af-

firmative answer to this question are two: (1) that the plaintiff had a right to take into the car with her the bag and its contents, and to carry the same in her hand or in some other way under her personal supervision and in her personal custody; and (2) that the defendants, as an incident to their contract to carry the plaintiff, entered into some further contract with reference to the carriage and safety of the same, which involved liability in case of loss or separation, without fault on defendant's part, from the plaintiff's possession. The first proposition is correct; the second cannot be maintained. The plaintiff, considering the well-known habits and requirements of passengers in the United States at this day, had an undoubted right to take with her her jewels and money in her journey from her summer to her winter residence. They were in bulk and character such that they could be taken into the car without any inconvenience either to the defendant or the other passengers. Indeed, they were of such bulk and character as to altogether escape observation. But this was simply *a permission;* there was no obligation, except as connected with some default or wrong on the part of the railroad in carrying the plaintiff.

"If the loss had arisen in consequence of the defendants' failure, diligently and with proper skill, to carry the plaintiff, a different question would have arisen. For in that case there would have been a violation of a contract, and the sole inquiry would have been as to whether the loss of the valuables carried in the hand could have been a ground for the recovery of damage. But the case shows that the plaintiff was in all things, so far as related to herself, diligently and

with proper skill, transported from the point to the point mentioned in her passage. There remains, then, the question whether the defendants assumed any responsibility with reference to the valuables other than that the plaintiff herself should be carried, and that the valuables should not be interfered with by any act or fault of theirs. This contract was completely performed. Notwithstanding this performance, the plaintiff, through her power of locomotion, and not at all through any default or act of defendant, found herself separated from her valuables; and the force of plaintiff's argument was that the defendants were under obligation to stop the train to enable her to recover them. There was no duty to do anything at all towards recovery, unless there had been some violation of the undertaking to carry, and there had been none. It is as if the plaintiff had, by a theft or other casualty, preceeding her journey, been separated from these same valuables, and recognizing them lying under defendants' road, insisted that the conductor should stop the train in order to allow her to regain them. The appeal was to a party who was under no legal obligation to aid in the recapture, and stood upon grounds of kindness and Christian charity, to be decided by the person appealed to by reference to moral and not legal considerations, and if refused caused *damnum absque injuria.* In all actions against the common carrier for *nonfeasance,* whether the action is in *assumpsit* or on the case, the gist of the action is the neglect to perform a duty which is created and measured by the contract. Beyond or outside of the contract the carrier is under no greater obligation to the shipper or passenger than is

the rest of the community. The doctrine *sic utere tuo ut alienum non lædas* can never have the effect to transfer from one contradicting party to another a risk of injury or loss which had, by the plain words or unmistakable implication of the contract itself, been lodged. In such a case the party who had assumed the responsibility must bear the damage or loss. Here the bag and its contents, so far as they depended upon the custody and location within the car, were by the contract of passage to be retained in the care of the plaintiff, and any disposition of them by her which turned out to be unwise or simply unfortunate, and resulted in loss, concerned the plaintiff alone. Consistently with all the circumstances set forth in the petition the continuance of plaintiff's possession of the bag and its contents, and their restoration to her possession after it had been interrupted, were matters which the plaintiff herself undertook to care for, to the exclusion of responsibility on the part of defendants. In this respect the defendants violated no obligation, for none existed."

In a note to this decision the editor of the Federal Reporter, approving the same, has added citations of numerous authorities: 20 Ohio State Report 278; 32 Wisconsin 85; 2 Duer 235; 27 La. An. Rep. 90; the R. E. Lee, 2 Abbott 49; 16 B. Monroe 307.

In Clark vs. Burns, 118 Mass. Rep. 227, Chief-Justice Gray, as the organ of the court, says: "The defendants, as owners of steamboats carrying passengers and goods for hire, were not inn-keepers. They would be subject to the liability of common carriers for the baggage of passengers in their custody, and

might perhaps be so liable for a watch of the passenger locked up in his trunk with other baggage; but a watch, worn by a passenger on his person by day and kept by him within reach for use at night, whether retained upon his person or placed under his pillow, or in a pocket of his clothing hanging near him, is not so entrusted to their custody and control as to make them liable for it as common carriers. Steamboat Crystal Palace vs. Vanderpool, 16 B. Mon. 302; Tower vs. Utica Railroad, 7 Hill 47; Abbot vs. Bradstreet, 55 Maine 530; Pullman Palace Car Company vs. Smith, 7 Chicago Legal News 237."

And in Weeks vs. N. Y., N. H. and H. R. R. Co., 72 New York Rep. 56, the court says: "If the claim of the plaintiff is to be sustained it must be held that, from the circumstances of the case, the defendants owed such duty to the plaintiff as that it was an insurer of the safe carriage of his securities, in the mode of carriage adopted by him, and for no greater consideration than the usual price or compensation paid by any passenger on its vehicles, and without knowledge or notice that he had them upon his person. It is apparent that if the carrier is liable in such case for a loss by robbery, it is liable also for a loss by theft by strangers (see Abbot vs. Bradstreet, 55 Maine 530), or for loss resulting from negligence in any way, no matter what the character of the valuables or the amount of them borne upon the person and in the sole care and custody of the passenger. It is then seen that the carrier of passengers, against his will, with no knowledge or notice of the charge and risk put upon t, becomes more in fact than a carrier of passengers;

it becomes an 'express' carrier of packages of value. It becomes such 'express' carrier with unusual burdens. It is without knowledge of the value for which it is liable. It is not given the custody of the package." Rorer on Rail Roads p. 1276

"A carrier (said Nelson, Judge, in Tower vs. Utica Railroad, 7 Hill 471) is not bound to act as guardian for his passenger and treat him as a ward under age. The passenger must at least assume the responsibility of taking ordinary care of himself, including the wearing apparel about his person." Whitney vs. Pullman Palace Car Company, 143 Mass. 244. This was the case of the loss of a satchel, which the plaintiff had retained in her personal control, supposed to be stolen while the train stopped for refreshments.

In Mrs. Del Valle and her Husband vs. Steamboat Richmond, the Supreme Court of Louisiana, in 27 An., p. 90, held that the carrier was not liable for jewelry left by the passenger in the pocket of her dress, and abstracted therefrom or lost, on the ground that they could not be considered to have been delivered to the carrier, and on the ground that the passenger contributed to the loss by lack of proper precaution and care. So also in the case of the R. E. Lee, 2 Abbot Rep. 49; Woods vs. Jones et als., 35 La. An. Rep. 1086.

It has been determined that articles retained in possession of the passenger for his personal use are not subject to the carrier's lien which attaches to baggage, and the seizure of such articles by the conductor to compel the passenger to pay fare is held to be an assault upon the passenger, for which the carrier is

liable. Where the carrier has a lien and right of retention it does not extend to articles retained in the custody of the passenger. The plaintiff in this case alleges that she had in her possession, in her handbag, five thousand eight hundred dollars in bank notes, and diamonds worth nearly as much more. This for a journey of fifty-eight miles; and if she paid her fare it was probably less than two dollars. In the argument of the case in the lower court, counsel for the plaintiff claimed the defendant's liability upon the alleged obligation of the railroad company to stop its train of cars to enable her to return to the place where she dropped her bag. The company would have been culpable in the highest degree if it had imperilled the lives of a whole train of passengers by stopping upon this great thoroughfare, over which trains were constantly moving. If the train had been stopped upon the application of plaintiff and a collision had occurred, causing loss of life and property, it would not have been a good defence to an action for such loss and damage. The conductor has no discretion in such a case. He is moving on fixed schedules, and cannot vary from them without involving great peril as to life and property, and damage to himself and his company. X Hutchenson on Carriers - Sec. 604-612

The plaintiff, after her suit was dismissed, endeavored to amend her petition by making allegations inconsistent with what she had averred therein. This could not be allowed, and she could not thereby avoid the judicial admissions and averments of her first petition. Stilley vs. Stilley, 20 La. An. Rep. 55;

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La. Code of Practice, art. 419; Case vs. Watson, 22 La. An. Rep. 351; Boatner vs. Scott, 2 Rob. Rep. 521; 2 La. An. Rep. 455; 34 La. An. Rep. 1220. An amendment cannot be allowed after the maintenance of an exception of no cause of action. "The dismissal of a petition which discloses no cause of action disposes of the suit, and no amendment can then be allowed." Hart & Co. vs. Bowie, 34 La. An. Rep. 325.

"There is another ground upon which plaintiff's claim must fail. By her own act she contributed to any loss suffered by her. She retained her bag of valuables in her own hands while closing the window of the car, and the dropping of it out of the window was her own act." 95 U. S. Rep. 443-697; 33 La. An. Rep. 155; 31 La. An. Rep. 491.

We have not discussed the question whether, under any circumstances, the plaintiff, as a passenger, could make the defendants liable for five thousand eight hundred dollars in bank bills and the other articles named, for this question and the further question whether she actually had in her possession any of the articles named, would be considered when the case would come up for trial, upon the evidence which may be offered if the judgment of the court was reversed and the case remanded for trial.

We respectfully submit that the exceptions were properly maintained. If the judgment of the court maintaining them should be reversed the case would then be remanded for trial on the merits, and such trial would be of no avail to plaintiff, for she would be